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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EARL FRANK WESTBROOK,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower court's interpretation of the sealing requirement for wiretap tapes conflicts with this Court's decision in United States v. Ojeda Rios?

2. Whether the law requires the immediate delivery and judicial sealing of wiretap tapes in light of the conflict of authority within the circuits?

3. Whether exclusive and continuous possession of the wiretap tapes by the monitoring law enforcement agency can be construed as compliance with the statute where no delivery or presentation of the tapes was ever made to any judge and no judicial seal was ever applied?

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UNITED STATES CONSTITUTION

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE

INTRODUCTORY STATEMENT

The petitioner requests that a writ of certiorari be issued to review the decision of the California Court of

Appeals for the Fourth Appellate District based on three grounds:

1) the decision of the lower court expressly relied on the 17-year-old, Sixth Circuit decision of United States v. Abraham, 541 F.2d 624 (6th Cir. 1976), whose rationale directly conflicts with this Court's opinion in United States v. Ojeda Rios;

2) as a result of the lower court's erroneous reliance on Abraham, its construction of the applicable statute is in direct violation of federal law; and

3) this Court must resolve the conflict within the circuits between Abraham and the decisional law of the other circuits.

This is the first wiretap case prosecuted in a California state court since the passage of Penal Code (hereinafter "P.C.") section 629 et seq. in 1988. The overall issue now before this Court is whether the procedures followed can be found to have met even the *minimum* Constitutional requirements of the applicable federal statute, or the state statute which is modeled after it. Petitioner submits that they

clearly did not.

Specifically, the government failed to comply with P.C. section 629.14 which expressly requires that, "Immediately upon the expiration of the period of the order, or extensions thereof, the recordings shall be made available to the judge issuing the order and sealed under his or her directions." In the present case, however, 1) the wiretap tapes were never made available to the judge within the meaning of the statute, nor judicially sealed as required by the statute; 2) the alleged "orai" sealing order was neither statutorily sanctioned nor sufficient; 3) the eventual *written* sealing order for the tapes was delayed by 181 days; and 4) there is no satisfactory explanation for this delay.

Petitioner therefore respectfully requests that a writ of certiorari be issued to review the judgment of the Fourth Appellate District Court of Appeals, Division One, in People v. The Superior Court of San Diego County (Westbrook), No. D017961, which vacated the order of the Superior Court

suppressing evidence for violation of California Penal Code 629.14. The opinion is attached as Appendix "A."

This case presents serious questions of federal law for which there is no state or federal precedent. It is a case of first impression and the law governing the procedures to be followed in conducting wiretaps in California, as indicated by the opinion of the Court of Appeals in this case, is now controlled by a case whose rationale conflicts with this Court's decisional law and is in pressing need of clarification.

OPINION IN THE COURT BELOW

The opinion of the Court of Appeals reversing the ruling of the superior court is officially reported as People v. Superior Court (Westbrook), 15 Cal. App. 4th 41, 18 Cal. Rptr. 2d 617 (1993). A copy of the opinion is attached as Appendix "A." The California Supreme Court denied review, with one dissenting vote, on July 22, 1993 (see Appendix "B.")

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STATEMENT OF JURISDICTION

On April 22, 1993, the Fourth Appellate District Court of Appeals entered judgment reversing the ruling of the superior court in this case. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1257(a) and governed by the Rules of the Supreme Court of the United States, Rule 10.1(c).

In this case a state court has decided an important question of federal law which has not been, but should be, settled by this Court. Further, the state court has also decided a federal question in a way that conflicts with an applicable decision of this Court.

I. UNDER THE RULE OF MICHIGAN V. LONG, THIS COURT MAY REVIEW THE STATE COURT'S DECISION AS IT RESTS PRIMARILY ON, AND IS INTERWOVEN WITH, FEDERAL LAW.

Because this is a case of first impression in California, there is no state case law whatsoever interpreting the statute. However, because the California statute is essentially a verbatim clone of the federal statute, the federal case law was

necessarily looked to for resolution of the questions at issue. There is therefore no issue concerning the existence of adequate and independent state grounds for the Court of Appeals' decision, nor is there any danger that an opinion from this Court would merely be advisory.

Even in cases where the existence of such grounds is unclear, however, this Court has held that when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that the federal law required it to do so. Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476 (1983). If this is not the case, and in fact the federal law is merely being used by the court for guidance in the same way that the decisions of other jurisdictions are used, then the state court need only state this

plainly in its decision. Id.

In the present case, it is not in dispute that the decision of the Court of Appeals rested primarily on, and was interwoven with, federal law, as that is almost the only law which exists on the present issue. Hence, under the rule of Michigan v. Long, supra, this Court may properly review the lower state court's decision.

II. THE SUPREMACY CLAUSE OF ARTICLE VI OF THE UNITED STATES CONSTITUTION MANDATES THAT THE FEDERAL LAW MUST PREEMPT ANY CONFLICTING STATE LAW.

Article VI of the United States Constitution states in pertinent part that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It is therefore axiomatic that a decision by a state court, such as the one at issue, may not stand where it conflicts with established federal law and precedent. Petitioner respectfully

submits that the present decision of the Fourth Appellate District Court of Appeals is contrary to existing federal statutory law[1] as well as the holdings of this Court and should be reviewed.

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[1] The federal wiretap statute is referred to as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. It is codified in Title 18, United States Code, §§ 2510-2521. The legislative history of Title III clearly indicates that Congress intended that state electronic surveillance laws may be more restrictive than federal provisions, and therefore more protective of individual privacy. See S.Rep. No. 1097 at 2187; Commonwealth v. Vitello, (1975) 367 Mass. 224, 327 N.E. 2d 819, 833. State surveillance statutes cannot be less restrictive than Title III, nor can they expand the opportunity to conduct surveillance beyond those provided by Title III. See S.Rep. No. 1097 at 2181, 2187, 2189; 114 Cong. Rec. 11206, 11470 (1968) (statements of Senator John McClellan); see United States v. Smith, 712 F.2d 702 (1st. Cir. 1983.)

Congress did not intend to supersede state attempts to protect conversational privacy but did intend to subject state eavesdropping legislation to minimum standards established by federal law. See Vitello, supra. Consequently, in order for evidence obtained through a state court surveillance order to be admissible in a state criminal proceeding, the evidence must have been acquired in a manner that conforms to both state and federal law. Thus, the intent of Title III is to have a general preemptive effect on state statutes giving less protection to the individual.

III. A CONFLICT EXISTS WITHIN THE FEDERAL CASE LAW WHICH MUST BE RESOLVED BY THIS COURT.

The decision of the Court of Appeals in this case, which reversed the trial court's suppression, relied in large part on a 17-year-old, Sixth Circuit case: United States v. Abraham, 541 F.2d 624 (6th Cir. 1976). In deciding that all the other existing authority which was cited by the petitioner on the issue was distinguishable, two of the three justices of the lower court felt that Abraham was dispositive of the present case. This was despite the fact that the stated rationale of Abraham's holding was subsequently nullified by this Court's express interpretation of the same statute in United States v. Ojeda Rios, 495 U.S. 257, 110 S.Ct. 1845 (1990).

Specifically, in 1976 the Sixth Circuit in Abraham relied on a Senate report for the proposition that "the purpose of § 2518(8)(a) is two-fold: to assure the admissibility of recordings in evidence and to require that they be treated as confidential court records." Abraham, supra, at 627. The

Abraham court also cited the decision of this Court in United States v. Giordano, 416 U.S. 505, 515, 94 S.Ct. 1820, 1826 (1974), in which the Court referred to § 2518(8)(a) as providing for "official control of the custody of any recordings or tapes produced by the interceptions carried out pursuant to the order,...". Abraham, supra, at 627.

The Abraham court therefore concluded--in less than equivocal language--that, "The requirement of sealing in § 2518(8)(a) appears to be related to the purpose of maintaining confidentiality of the recordings." Id., at 628. Even that court was quick to acknowledge, however, that this interpretation was not consistent with other circuits' rationales such as the Fifth Circuit in United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir. 1975), which held that the intent of § 2518(8)(a) is to safeguard against tampering. Abraham, supra, at 628.

However, as recently as three years ago, this Court decided the case of United States v. Ojeda Rios, 495 U.S.

257, 110 S.Ct. 1845 (1990), which mainly dealt with the issue of what constituted a satisfactory explanation for delays in sealing. Within that decision, though, is the unmistakable explanation that

> The primary thrust of § 2518(8)(a), [cite], and a congressional purpose embodied in Title III in general, [cite], is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes. Rather, the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded. It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings.

Ojeda Rios, supra, at 1849 [emphasis added.]

Thus, the Abraham court's suspicion that their interpretation was incorrect was confirmed. In light of the fact that the true intent of the statute was indeed to prevent tampering--not merely to maintain confidentiality--it is therefore vital that the tapes be physically surrendered to the court for

sealing. The Abraham decision was therefore invalidated after Ojeda Rios.

Because the lower court failed to recognize this fact, however, there now exists a conflict within the federal case law which must be resolved by this Court. Failure to do so will result in disparate procedures and results within the federal circuits as well as the state courts.

STATUTES INVOLVED

The federal statute, 18 U.S.C. § 2518(8)(a), provides as follows:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.

> They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2518 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communications or evidence derived therefrom under subsection (3) of section 2518.

[Emphasis added.]

Section 629.14 of the California Penal Code provides as follows:

> The contents of any wire communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or other comparable device. The recording of the contents of any wire communication pursuant to this chapter shall be done in a way that will protect the recording from editing or other alterations and ensure that the audio tape recording can be immediately verified as to its authenticity and originality and that any alterations can be immediately detected. In addition, the monitoring or recording device shall be of a type and shall be installed to preclude any interruption or monitoring of the interception by any unauthorized means. Immediately upon the expiration of the period of

the order, or extensions thereof, the recording shall be made available to the judge issuing the order and sealed on his or her directions. Custody of the recording shall be where the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for 10 years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of Sections 629.24 and 629.26 for investigations. The presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire communication or evidence derived therefrom under Section 629.28.

STATEMENT OF THE CASE

On 15 January, 1992, the Honorable Raymond Edwards, Jr., San Diego Superior Court Judge, issued an order on application of the San Diego District Attorney's Office authorizing the interception of wire communications of telephone numbers belonging respectively to defendant-petitioner Earl Frank Westbrook and another defendant. On 13 February, 1992, an order was signed for an extension of that authorization.

On 26 February, 1992, the wiretap concluded. At some

unspecified time after the conclusion of the wiretap, Deputy District Attorney Evan Miller spoke with Judge Edwards as follows:

> I suggested to Judge Edwards that given the tapes were already sealed and in the custody of the DEA Evidence Custodian, he designate the DEA Evidence Custodian as the person who should keep the recordings for the 10 years as required under section 629.14. He agreed. I then told Judge Edwards that I would prepare an order for his signature detailing what we had discussed.

Little did Judge Edwards know, however, Mr. Miller was not to prepare this order until *half a year* later.

Rather, Mr. Miller spent the next six months doing "a tremendous amount of work" in preparation for the grand jury, "preparing arrest and search warrants in anticipation of unsealing the indictment of June 2," doing "arraignments, bail reviews and motions," and, from the end of June to the middle of August, he "was out of the office for almost 6 weeks on a combination of military duty and vacation." [Emphasis added.] Evidently, during this time no other deputy was assigned to or worked on the case. It was not until Mr.

Miller's return that he "realized that [he] had not had Judge Edwards sign the sealing order."

Hence, no sealing order pursuant to California Penal Code § 629.14 was signed by the court until August 25, 1992, approximately six months after the conclusion of the wiretap. The recordings were never "made available to the judge issuing the order" for the purpose of satisfying the sealing requirement. Indeed, at no time have the tapes ever been out of the custody of law enforcement or brought before a judge, nor has a judicial seal ever been applied to the tapes at any time.

On 2 November, 1992, as a result of defendant's motion to suppress, the Honorable J. Perry Langford issued an order which read in pertinent part:

> The wiretap recordings, and all evidence derived therefrom, must be suppressed pursuant to Penal Code section 629.14. Whatever other safeguards the Legislature may have included in the statute, it adopted the federal sealing provisions. The gist of those procedures is, that once the wiretaps are completed, the tapes shall come under court control and be placed under

seal under the direction of the judge. The statute permits storage by others, but not the sealing function. The point of the exercise is to deny the agency access to the tapes by a sealing operation conducted under the supervision of the judge. The prosecution devised an alternative procedure which it claims, rightly or wrongly, is just as good as the one devised by the Legislature. The People have explained what they did, but have provided no satisfactory explanation why they did not simply read the statute and follow it. This court is bound to apply the law in accordance with its terms and suppress the evidence.

[Emphasis supplied] Order of the Court, Nov. 2, 1992.

Judge Langford further expounded on his ruling at the suppression hearing:

> ...[T]he essence of what was intended [by the Legislature] was that when the recording was complete, the integrity of the tape recordings would be assured by passing them from the jurisdiction of the enforcement agency to the control of the court....
>
> I have no doubt that could be done. And if it had been done in this case, if [the prosecutor] had simply, when they finished the recording, gotten all those sealed envelopes and brought them up to Judge Edwards and said, "We want these sealed in accordance with the statute," probably they would have dropped them into a big envelope, the clerk would have

put the masking tape over the envelope and then applied the court seal, and maybe given them back, and the statute would have been satisfied....

Now, it may be that what the prosecution worked out--I gather with the acquiescence of Judge Edwards--was better. But better isn't good enough. What is contemplated here is that the law be satisfied. And what is totally left out of the prosecution's argument--this isn't form over substance. This a very realistic, practical problem with very realistic, practical consequences.....

What we have here is an abdication or a usurpation, however you want to describe it, a combination of both. The prosecution and Judge Edwards agreed basically that the prosecution would take care of it instead of Judge Edwards, although I'm not absolutely sure Judge Edwards ever would have understood that. He got the problem in pieces. They apparently came to him at the beginning and said, "This is what we propose to do;" and he thought it sounded very impressive and said, "Fine." And then nobody came back when the statute said they were supposed to come back to do what the statute said to do.

And I don't infer from that Judge Edwards ever ratified their nonappearance. They came along six months later and asked him to patch it up, and he did the best he could, but that does not to my mind anywhere approach compliance with the statute.

> We have a new statute. The reaction of other jurisdictions to it [was] that it should be strictly construed and the requirements given their full meaning. The California law is new. We could treat our statute differently, and that's what the Attorney General basically asks me to do, to say that because we included some other safeguards, we can relax on these.
>
> Well, if the Legislature had meant that, they could have said it. The Legislature could perfectly well have said, after its requirement of verification, that the agency shall adopt means of safeguarding the integrity of the tapes subject to the approval of the judge issuing the wiretap order. If they had said that, then this procedure would be perfectly sound.
>
> They didn't say that. They elected something very different; they elected to retain the former provisions. And I feel that I must set a good example for all those who tap wires in the future in California by saying: Do it strictly by the book. Accordingly, the order is in accordance with the tentative with respect to the question of the sealing.

[Emphasis supplied.]

As a result of this decision, the government sought a writ of mandate from the Fourth Appellate District, Division One. On April 22, 1993, that court filed a 2-1 decision vacating Judge Langford's order. A dissenting opinion was

filed by Justice Weiner. On July 22, 1993, the California Supreme Court denied Mr. Westbrook's Petition for Review with one dissenting vote from Justice Mosk. See Appendix "B."

REASONS FOR ALLOWANCE OF THE WRIT

I. SECTION 629.14, LIKE ITS FEDERAL COUNTERPART, REQUIRES THE IMMEDIATE DELIVERY AND JUDICIAL SEALING OF WIRETAP TAPES.

Section 629 et seq. of the California Penal Code was enacted by the state legislature in 1988, and amended in part in 1989. Section 629 et seq. is the California wiretapping statute. It permits electronic surveillance upon the satisfaction of certain conditions. In addition, it contains provisions in accordance with the federal wiretapping statute which is referred to as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The federal statute is codified in Title 18, United States Code, §§ 2510-2521.

One of the provisions of the California wiretapping statute is found in § 629.14. This section contains the

requirement concerning proper recording of intercepted communications and the "sealing" requirement. It is nearly word for word the same as the federal statute covering the same area in Title III. (See "Statutes Involved," supra.)

Section 2518(8)(a), as well as P.C. § 629.14, requires that immediately upon the expiration of the period of the order, or extensions thereof, the recordings shall be made available to the judge issuing the order and sealed under his directions. This provision imposes a dual obligation: first, immediate delivery, and, second, sealing of the tapes. According to this Court's decision United States v. Ojeda Rios, 495 U.S. 257, 110 S.Ct. 1845 (1990), the primary thrust of this provision is to ensure "the reliability and integrity of evidence obtained by means of electronic surveillance by limiting the opportunity for the government to tamper with, alter, or edit the conversations that have been recorded." 110 S.Ct. 1845, 1849.

The delivery requirement also implements the concept

of judicial control by vesting in the judge, not the officer, decisions about storage of and access to the originals pending trial, thereby avoiding completely secretive surveillance. United States v. Tortorello, 480 F.2d 764, 774 (2nd Cir. 1973). Prompt delivery also avoids the risk of accidental erasure or damage, mixed tapes, loss, or other problems that could arise from the unregulated handling of the recordings.

Section 2518(8)(a), as well as section 629.14, requires that the tapes be made available and delivered to the judge upon the conclusion of the electronic surveillance. Thus, tapes may accumulate and be kept in the officer's control until the conclusion of the electronic monitoring. It is at that time, however, that the immediate duty to deliver and to seal must be obeyed.

Courts have strictly interpreted the requirement of the sealing statute. Exclusion of evidence is ordered and vigorously enforced where delivery has been delayed, even if

no challenge has been made to the accuracy or authenticity of the recordings. In some cases protracted delays have been held to require suppression as a matter of law without consideration of the reasons for the delay. United States v. Gerena, 695 F.Supp. 649, 674 (D. Conn. 1988) [82 and 96 days].

In United States v. Ojeda Rios, supra, this Court rejected the government's contention that a satisfactory explanation for delay in presenting tapes for sealing could be fulfilled with a showing of why the delay occurred and that the tapes are authentic. Stating that the section requires a *satisfactory* explanation, not simply an explanation, the Court held that the government must explain not only why a delay occurred but also why it is excusable.

The Ojeda Rios decision makes it quite clear that evidence is to be excluded if there is a violation of the immediate delivery and sealing requirement. In the absence of a satisfactory explanation for delay in the presentation of

the tapes to the judge and the order for their sealing, exclusion is required. If the government desires to postpone the sealing of tapes, it must seek authority to do so immediately.

II. THE PROSECUTOR VIOLATED THE STATUTE BY FAILING TO DELIVER OR PRESENT THE TAPES TO THE JUDGE FOR SEALING.

In the present case, the prosecution completely failed to comply with the provisions of § 629.14. At the conclusion of the electronic surveillance, the prosecutor failed to present the tapes to the judge for the application of the judicial seal.

Though case law is scarce on this issue, the existing federal and state cases clearly indicate that the "made available" language of both the applicable federal and state statutes requires actual delivery and/or presentation of the tapes to the authorizing judge. A literal interpretation of the words "made available" in the sense of merely being capable of possessing the tapes would serve no purpose in the statute. The tapes must be brought into the presence of the

judge so as to permit him or her to order the seal applied and verify the presence of the judicial seal required by the statute.

As the case law shows, the entire purpose of the provision is to physically transport the tapes before the judge so they may be judicially scrutinized and sealed. There is nothing accomplished by merely letting the judge know that he (or she) could have the tapes if he wanted them. The intent of the statute is to obtain a judicial seal from a neutral party.

The existing federal case law is in overwhelming agreement that the words "made available" are synonymous with presenting or delivering the tapes to the judge. For example, just last year the Ninth Circuit included the fact that the tapes must be physically taken to the judge in its description of a sealing process: "The [FBI] recordings were inventoried, boxed along with the tape logs, and prepared for *presentation* to Judge Vukasin for sealing pursuant to

statutory requirements." [Emphasis added.] United States v. Pedroni, 958 F.2d 262, 264 (9th Cir. 1992).

The Second Circuit treats this interpretation as a foregone conclusion:

> There is no question that, in light of our prior interpretations of § 2518(8)(a), the government's presentation of the tapes for judicial sealing 14 days after expiration of the authorization order was not "immediate" within the meaning of that section. In United States v. Vasquez, 605 F.2d 1269, 1278 (2d Cir. 1979)..., for example, we suggested that any presentation made more than two days after the end of the wiretap could not be considered immediate. This view is consistent with our rulings in other cases that presentations after delays of less than a week were not immediate. [String cite.]

[Emphasis added.] United States v. Rodriguez, 786 F.2d 472, 476-77 (2nd Cir. 1986). This assumption that the tapes should be physically presented to the judge was also present in the Second Circuit as early as 1976:

> Section 2518(8)(a) provides for *continuous* judicial scrutiny of the entire process of obtaining and utilizing recorded conversations, and consequently requires their presentation to a judge "immediately"--as the statute insists--

> upon the expiration of the authorizing order. Under the Government's interpretation, however, recorded evidence could be kept in the prosecutor's office, unsealed, for a prolonged and indefinite period of time, so long as a judicial sealing order is eventually obtained sometime before trial.

United States v. Gigante, 538 F.2d 503, 506 (2nd Cir. 1976). Note that Gigante specifically condemns the actions in which the government engaged in the present case, namely, keeping the tapes in the government's hands, without their having been presented to a judge (and, therefore, remaining unsealed), for a prolonged and indefinite period of time.

The Fifth Circuit also holds that the statute requires actual delivery of the tapes to the judge:

> Finally, although the authorizing judge received the tapes of the wiretapped conversations five weeks after termination of the wiretap when the tapes had been transcribed, instead of immediately as required by statute, the parties stipulated to facts showing chain of custody and lack of alteration of the tapes....[T]he better procedure would have been to deliver the tapes immediately to the judge and have him release them for transcription....

United States v. Cohen, 530 F.2d 43, 46 (5th Cir. 1976).

The state of New York, which also had a wiretap statute with the same language (Code of Criminal Procedure § 822), has unequivocally held that presentation is essential, even in cases almost identical to the one at bar:

> The Justice who issued the eavesdropping warrant apparently was advised of the storage arrangements for the tape recordings by the District Attorney, but they were never presented to him for sealing and none of them were, in fact, ever sealed....
>
> The sealing requirement is to be strictly construed and it is not the defendant's burden to come forward with evidence of tampering when unsealed recordings are sought to be introduced into evidence....
>
> While the parties charged with custody of the tape recordings were cognizant of the sealing requirement, they did not present them to the issuing Justice for sealing as was their duty. That the issuing Justice was advised of the custody arrangements will not suffice. While he may have tacitly approved them, the fact remains that the recordings were not sealed.

People v. Nicoletti, (1974) 34 N.Y.2d 249, 252-53.[2] The

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[2] In the opinion of the lower court, the majority infers on page 14 that Nicoletti is not persuasive after a subsequent New York case, People v. Portanova, (1977) 56 A.D.2d 265, 392 N.Y.S.2d 123, which held that sealing in the judge's

presentation requirement also implements the concept of judicial control by vesting in the judge--not the officer--decisions about storage of and access to the originals pending trial, thereby avoiding completely secretive surveillance. United States v. Tortorello, 480 F.2d 764, 774 (2nd Cir. 1973).

The fact that, in this case, Judge Edwards did not require that the tapes actually be produced is no excuse for the prosecutor's failure to comply with the statute or the controlling case law. The prosecution should not be allowed to fall back on the judge's abdication of his responsibility as a justification for noncompliance.

It is undisputed that the tapes were never presented, delivered, or produced for the court at any time. Hence, the

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presence is not required by the statute. The Portanova decision, however, expressly relies on United States v. Abraham, 541 F.2d 624 (6th Cir. 1976). As discussed in section III., infra, the rationale of Abraham was invalidated by this Court in United States v. Ojeda Rios, 495 U.S. 257, 110 S.Ct. 1845 (1990). Therefore, the Portanova decision is likewise invalid after Ojeda Rios, leaving Nicoletti to stand on its merits.

statute was violated in two respects: the tapes were not immediately made available, nor were they ever presented to the judge. The government is unable to deny these facts.

Not only did the prosecutor not immediately present the tapes to the judge, but he never brought the tapes before the judge at any time. At no time during or after the termination of the wiretap did the judge ever see the actual, physical tapes. Their very existence could not be verified by anyone but the prosecutor or law enforcement--a far cry from the intended neutral monitoring of a third-party judicial officer.

Neither the letter nor the spirit of the statute was satisfied in that the tapes were never actually presented to the judge, nor was their integrity ensured by the application of an immediate and actual judicial seal which should have been applied upon the tapes' delivery.

III. CONTRARY TO THE LOWER COURT'S OPINION, THE RATIONALE OF UNITED STATES V. ABRAHAM WAS INVALIDATED BY UNITED STATES V. OJEDA RIOS.

The majority opinion from the lower court relies heavily

on its conclusion that, "Abraham is the only case with facts similar to those in issue here." Appendix "A," p. 21. This reference is to the seventeen-year-old case of United States v. Abraham, 541 F.2d 624 (2d Cir. 1976). Petitioner submits, however, that the following analysis (and the opinion of the dissent in the lower court) will show that the rationale of Abraham has since been invalidated by United States v. Ojeda Rios, 495 U.S. 257, 110 S.Ct. 1845 (1990).

In Abraham, a government attorney advised the district judge that tapes of intercepted telephone conversations were available for inspection at the time he presented the motion for an order sealing them. Without requiring that the recordings be brought to him or viewing them at the FBI office where they were in custody, the district judge entered orders that the tapes be sealed and placed in the custody of the FBI within the personal control of an FBI agent. The Sixth Circuit reversed the trial court and held that the statutory sealing requirements were complied with even though the sealing did

not take place within the presence of the judge. Id., at 627.

The Abraham court went on to state as its rationale, however, that,

> The requirement of sealing in § 2518(8)(a) appears to be related to the purpose of *maintaining confidentiality of the recordings*....This is clearly the purpose of § 2518(8)(a), which relates to applications and orders authorizing interceptions. [cite] Courts have traditionally withdrawn particular records from public scrutiny by ordering them sealed to preserve confidentiality. The presence of the judge at the actual sealing would offer no additional guarantee that confidentiality would be maintained.

Id., at 628 [emphasis added.] It is in this crucial paragraph that the error of the Abraham decision becomes clear after Ojeda Rios. Indeed, even as the Sixth Circuit rendered its opinion in Abraham, it noted that this rationale was at odds with the Fifth Circuit decision in United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir. 1975), which reasoned that the purpose of § 2518(8)(a) "is to safeguard the recordings from editing or alteration." Abraham, supra, at 628. Ojeda Rios showed that the Fifth Circuit was indeed correct.

Although the main issue in Ojeda Rios involved the satisfactory explanation of delay in obtaining a judicial seal, the following passage from the opinion unequivocally resolved all doubt as to the purpose of the sealing requirement:

> The primary thrust of § 2518(8)(a), [cite], and a congressional purpose embodied in Title III in general, [cite], is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance. The presence or absence of a seal does not in itself establish the integrity of electronic surveillance tapes. Rather, the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded. It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings.

Ojeda Rios, supra, at 1849 [emphasis added.]

Hence, it is now undisputed that the purpose of the sealing requirement is to ensure the reliability and integrity of the recording by preventing tampering, altering or editing. As stated by Justice Weiner in his dissent in the lower court, "Where the purpose of the statute is to prevent alteration of

the tapes by the government, that purpose is served only where the tapes are removed from prosecution custody for sealing." Appendix "A," dissent, pg. 5 [emphasis added.] Justice Weiner goes on to point out that the possibility of pre-sealing alteration is similarly addressed by the requirement that the tapes be presented to the judge "immediately" upon conclusion of the interception. The government is then held accountable for any subsequent delay.

Another salient point raised by the dissent is that alteration is more useful and likely to occur once the nature of the defense becomes clear. Hence, it is particularly important to have the tapes physically removed from the government's custody and sealed by a neutral third party. In the present case, no such third party was aware of when the tapes were actually sealed.

It is therefore clear that Abraham is invalidated by Ojeda Rios as the express rationale of the Abraham court in support of its decision was specifically addressed and

eliminated by the Ojeda Rios decision. The majority's opinion from the lower court is conspicuously devoid of argument as to why "Ojeda Rios has not vitiated Abraham's reasoning...". This conclusion is asserted without explanation, *ipse dixit.*

Indeed, the Abraham court expressly reasoned that a judge's presence is not needed merely to ensure confidentiality. This is true. However, since Ojeda Rios established that it was non-tampering--not confidentiality--which was the main concern of the statute, *it is clear that the presence of a judge is not only helpful but essential.* In light of Ojeda Rios, Abraham may no longer be considered applicable.

IV. THERE WAS NO VALID ORAL SEALING ORDER IN EFFECT AT ANY TIME DURING THIS CASE.

Having conceded that the written order was not entered until six months after the conclusion of the wiretap, the government has argued that an informal oral sealing and custody order was in effect. This *ex post facto* attempt to conjure compliance with the statute simply does not wash. As

well-intentioned as the alleged oral sealing orders may have been, the fact remains that the statute was not followed.

Specifically, section 629.14 mandates that judicial sealing is to occur at the time the tapes are made available to the judge, immediately upon expiration of the order. Neither the so-called "pre-" nor "post-interception" oral sealing orders is in line with the clear instructions of the statute. Hence, the fact that the alleged order was made orally rather than in writing is not as disturbing as its timing.

The evil of allowing an oral, as opposed to written, sealing order is not so much in its lack of documentation, as the fact of the order may later be memorialized in a declaration. Such a procedure is, in the words of the lower court, "cumbersome" and clearly not the "better practice." Rather, *an oral sealing order which is made before the wiretap even begins or after the wiretap has concluded but not concurrent with the actual judicial sealing of the tapes, is simply violative of the letter and spirit of the statute.*

Such is the situation in the present case. Even assuming that Judge Edwards orally ordered the sealing of the tapes before, during, and at some point after the wiretap, he never complied with the statute in that, immediately upon the expiration of the interception, he failed to oversee and ensure that the tapes received a judicial seal under his direction. This failure is fatal, as established in a case relied on by the lower court, United States v. Gigante, 538 F.2d 503 (2d Cir. 1976).

In Gigante, agents investigating possible illegal gambling operations concluded a wiretap on November 24, 1972. The agents failed to have the tapes judicially sealed until "sometime in December," still a mere fraction of the time lapse in the present case. Id., at 504. Nevertheless, the Third Circuit was appalled at even that relatively short delay: "Of paramount concern in this appeal, however, is the Government's egregious delay in seeking judicially-supervised sealing of the tapes as required by the statute." Id., at 503-04

[emphasis added.]

More importantly, however, one of the main issues in Gigante was whether a "formal judicial order or record of proceedings regarding the judicial sealing" was required. In that case, however, unlike the one at bar, *the agents "returned" the tapes to the judge who "personally sealed and initialed a box containing the recordings."* Id., at 504. Indeed, the Gigante court indicated that it was the fact that the tapes "remained in a locked filing cabinet without having received judicial attention" which was unacceptable. Id.

Therefore, even though the Gigante court indicated that, in that case, it was willing to accept the absence of a signed, formal sealing order, the circumstances of that case were so much more compelling as to make it completely distinguishable from the present case. Specifically, as discussed in the previous section, it is a "given" in the Second Circuit that wiretap tapes shall be actually and physically "presented" to the judge for sealing. Therefore, the issue of

whether or not a written order exists is naturally secondary to the fact that the judge must personally apply his seal to tapes which are physically before him.

Hence, petitioner's objection to the alleged oral sealing order in the present case stems not so much from its lack of documentation as from its utter lack of reliability in light of the failure to present or deliver the tapes. In fact, the Gigante court--which did have an actual, physical sealing by the judge --still affirmed the suppression of the tapes based solely on the issue of extensive delay. Clearly, if the present facts were before that court, there would no question whatsoever that the procedures followed were not even remotely close to satisfactory.

The government also contends that the unilateral sealing of the tapes by the case agent, outside the presence of the judge--without the tapes having been made available to the judge--at a time not set forth in the statute, and in a manner not approved by the statute, somehow constitutes

compliance with the statute. This argument likewise should be rejected. The sealing involved must be done in accordance with the statute. The process must be a *judicial* sealing, not some improvised, unilateral sealing accomplished by the prosecution.

In United States v. Vasquez, 605 F.2d 1269 (2nd Cir. 1979), the Second Circuit dealt with a similar argument by the government which sought to evade the requirements of the statute. The court noted in relevant part:

> We reject the government's argument, apparently accepted by Judge Mishler, that the attempted unilateral "sealing" of the tapes by the investigators themselves outside the presence of the court, can satisfy the statutory command that the tapes "be made available to the judge...and sealed under his directions." [Emphasis added.] Although certainly all reasonable precautions against tampering should be taken both before and after judicial sealing is accomplished, see e.g., United states v. DePalma, 461 F.Supp. 800, 826-29 (S.D.N.Y. 1978), such procedures do not substitute for the presence of a "seal provided for by this subsection."

Vasquez, at 1278, f.n. 20.

The purpose of requiring a judicial seal is not merely to make the government "jump through hoops" and comply with red-tape formalities. As has always been the purpose of a seal throughout history, it symbolizes that the item which bears the seal is in a pure and unadulterated condition, in exactly the form which the sealer intended it to be. In the present case, this assurance was never provided at any time, in any form.

Once again, it is undisputed that, because the judge never actually saw or touched the tapes, no actual judicial seal was ever applied and the statute was completely violated. The government's insistence on the existence of an "oral sealing order" with nothing more is simply not what was contemplated by the legislature as it does not the serve the purpose of providing any assurance of integrity.

As emphasized by Judge Langford in his ruling, the actual sealing process could have been as simple as bringing an envelope full of tapes to the courtroom and having the

clerk tape the envelope closed and apply the court seal. Such a procedure would have clearly satisfied the statutory requirements that the tapes be presented to the court and that they be judicially sealed. The fact is, however, that no judicial seal of any type was ever applied to the tapes at any time.

V. NO JUDICIAL SEALING ORDER WAS SOUGHT UNTIL SIX MONTHS AFTER TERMINATION OF THE WIRETAP.

Perhaps the most egregious fact in the present case is the incredible delay of six months before the government sought a signed sealing order from the court. The prosecutor has attempted to explain this extraordinary delay with the ordinary demands of his work and life, to wit: preparing the case for the grand jury, preparing arrest and search warrants, "various post-arrest activities," military duty and vacation.

It is impossible to overlook the irony of the situation in that a large part of the government's explanation for why the order was not timely pursued was that counsel was too busy

moving on to the next phases of the case. The facts paint an undeniable picture that counsel was simply so eager to "get on with" this prosecution that the critical statutory requirement of an official sealing order simply fell by the wayside.

Most courts impose an exacting standard concerning delivery of the tapes. The New York Court of Appeals has stated that delivery on the day after the termination of the surveillance is generally required. People v. Gallina, (1985) 66 N.Y. 2d 52 [delay of more than one day condemned.] A similar approach has been taken by the Second Circuit which has stated that any delay beyond one or two days calls for explanation. United States v. Vasquez, 605 F.2d 1269, 1270 (2nd Cir. 1979). Certain states such as Massachusetts specify a seven day maximum period between termination of interception and delivery. See MASS. General Laws Annotated Chapter 272, 99. It should be noted that it is not necessary to deliver the tapes to the issuing judge if that judge is not available. Prompt delivery to another judge is

preferable to postponement until the issuing judge becomes available. In re Special February 1977 Grand Jury, 570 F.2d 674, 678 (7th Cir. 1978); United States v. Poeta, 455 F.2d 117, 122 (2nd Cir. 1972).

This Court recently set forth the standard for "excusable delay" in obtaining a judicial seal in wiretap cases. In Ojeda-Rios, supra, Justice White wrote as follows:

> [1] The Government first argues that because § 2518(8)(a) states that as a prerequisite to admissibility, electronic surveillance tapes must either bear a seal or the Government must provide a "satisfactory explanation" for the "absence" of a seal, the "satisfactory explanation" requirement does not apply where the tapes to be offered in evidence actually bear a seal, regardless of when or why the seal was applied. This argument is unpersuasive. The narrow reading suggested by the Government is not a plausible interpretation of congressional intent when the terms and purpose of § 2518(8)(a) are considered as a whole. The section begins with the command that tapes shall be sealed "immediately" upon expiration of the underlying surveillance order and then, prior to the clause relied upon by the Government, provides that "the seal provided for by this subsection" (emphasis added) is a prerequisite to the admissibility of electronic surveillance tapes. The clear import of these provisions is

that **the seal required by § 2518(8)(a) is not just any seal but a seal that has been obtained immediately upon expiration of the underlying surveillance order**. The "absence" the Government must satisfactorily explain encompasses not only the total absence of a seal but also the absence of a timely applied seal. Contrary to what is so plainly required by § 2518(8)(a), the Government would have us nullify the immediacy aspect of the sealing requirement....

The Government's view of the statute would create the anomalous result that the prosecution could delay requesting a seal for months, perhaps even until a few days before trial, without risking a substantial penalty. Since it is likely that a district court would automatically seal the tapes, there would be no "absence" or a seal, in the sense suggested by the Government, and § 2518(8)(a) would not come into play, even though the tapes would have been exposed to alterations or editing for an extended period of time. Such a view of the statute ignores the purposes of the sealing provision and is too strained a reading of the statutory language to withstand scrutiny. Like every Court of Appeals that has considered the question, we conclude that § 2518(8)(a) applies to a delay in sealing as well as to a complete failure to seal tapes.

[2] The Government's second contention is that even if § 2518(8)(a)'s "satisfactory explanation" requirement applies to delays in sealing tapes, it is satisfied if the Government first explains why

the delay occurred and then demonstrates that the tapes are authentic. This submission, however, also is not a sensible construction of the language of § 2518(8)(a) and would essentially nullify the function of the sealing requirement as a safeguard against tampering. The statute requires a satisfactory explanation, not just an explanation. It is difficult to imagine a situation in which the Government could not explain why it delayed in seeking to have the tapes sealed. Even deliberate delay would be enough, so long as the Government could establish the integrity of the tapes; yet deliberate delay could hardly be called a satisfactory explanation. **To hold that proof of nontampering is a substitute for a satisfactory explanation is foreclosed by the plain words of the sealing provision.**

It is true that offering to prove that tapes are authentic would be consistent with Congress's concern about tampering, but **even if we were confident that tampering could always be easily detected, we would not be at liberty to agree with the Government, for it is obvious that Congress had another view when it imposed the sealing safeguard.**

The Government contends that it has an incentive to seal tapes immediately because otherwise, even under its proposed test, it will face lengthy pretrial suppression hearings in which it must establish the authenticity of tape recorded conversations. This is no more than a statement that only rarely would there be a delay and does not answer the issue posed

> where there is a delay that is not satisfactorily explained. Furthermore, the incentive argument is suspect since timely sealing, and the Government concedes, Tr. of Oral Arg. 10-11, 22-23, does not foreclose a challenge to authenticity, which in any event would require lengthy proceedings.
>
> We conclude that the "satisfactory explanation" language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable. This approach surely is more consistent with the language and purpose of § 2518(8)(a).

110 S.Ct. 1845, 1849-50 [emphasis supplied.]

In the present case, the excuse offered by the government is that the prosecutor was too busy with other aspects of the case and "a combination of" military duty and vacation. Such an excuse is so unsatisfactory as to be embarrassing. Suffice it to say that "jumping the gun" and proceeding with the prosecution of a case whose evidence has not been properly obtained and then going on vacation simply does not pass statutory muster. The government is unable to put forth any reason why such behavior is in any

way excusable.

VI. THE JUDICIAL SEALING ORDER WHICH WAS EVENTUALLY OBTAINED WAS INSUFFICIENT.

The final blow of this case was that, when the sealing order was eventually obtained six months after the fact, it was utterly insufficient in that it did not require that the tapes be presented or delivered, nor did it make any mention of the application of a judicial seal. The language of the August 25, 1992, order simply stated that the tapes were "ordered sealed."

The events leading up to the written sealing order are illustrative of the continuing failure to comply with the statute. The prosecutor has stated in his declaration that he did in fact meet with the judge after the termination of the monitoring. Evidently the production and custody of the tapes was "discussed." This conversation is what petitioner refers to as the "oral sealing order." Because the judge failed to request the production of the tapes, however, the prosecutor did not include this in what he later authored as the sealing order.

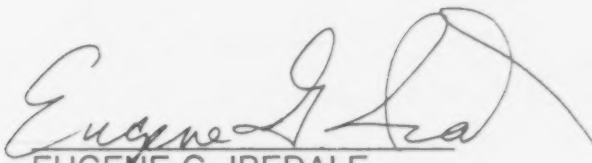
The prosecutor and judge agreed that this alleged "oral sealing order" (which did not involve any sealing at all) would be "reduced to writing in the form of an order which the prosecutor would prepare." Six months later, the prosecutor produced a one-page document containing two sentences. The first sentence states that the tapes are "ordered sealed." The second sentence states that the tapes shall be kept in the custody of the D.E.A. for a period of ten years and gives the D.E.A.'s address.

The prosecutor has stated in his declaration that he told the judge he would prepare an order "detailing" what they had discussed. Clearly, however, the document which took half a year to prepare is conspicuously devoid of details. In particular, it completely fails to include the two most important aspects of the statute: the immediate production and judicial sealing of the tapes. Hence, the document which ultimately passed as the order for sealing the tapes was completely insufficient.

CONCLUSION

For the reasons set forth above, petitioner requests that the Court grant his petition for a writ of certiorari to review the decision of the Fourth Appellate District, Division One, and set the case for briefing and oral argument. In the alternative, it is requested that this Court grant certiorari, vacate the judgment and remand to the Court of Appeals.

Dated: 6 Oct. 1993 Respectfully submitted,



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EARL FRANK WESTBROOK

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Petitioner, V. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D017961 (Super Ct. No. CR131641)
EARL FRANK WESTBROOK, Real Party in Interest.	

FILED
Stephen M. Kelly, Clerk
APR 22 1993
Court of Appeal Fourth District

PROCEEDINGS in mandate after the court granted motion to suppress tape recordings. J. Perry Langford, Judge. Petition granted.

Edwin L. Miller Jr., District Attorney, Evan G. Miller, Deputy District Attorney, Daniel E. Lungren, Attorney General

and John A. Gordnier, Senior Assistant Attorney General for Petitioner.

No appearance for Respondent.

Eugene G. Iredale for real party in interest.

The People seek a writ of mandate after the court granted Earl Frank Westbrook's (Westbrook) motion to suppress tape recordings of certain telephone conversations. Westbrook argued, inter alia, there was no timely order regarding sealing and the tapes had never been delivered to the judge as purportedly required by Penal Code[1] section 629.14. The court granted the motion based on the government's failure to comply with the section's purported requirement that sealing be conducted under the supervision of the judge. Because we conclude a timely oral sealing order was in effect and the court's participation in the physical sealing of the tapes was not required by statute, we grant the

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1 All statutory references are to the Penal Code unless otherwise specified.

petition.

BACKGROUND

On January 15, 1992, the Honorable Raymond Edwards, Jr., on application of the San Diego District Attorney's Office issued an order authorizing the interception of wire communications of telephone numbers belonging to Westbrook and another defendant. On February 13, 1992, Judge Edwards signed an extension of the authorization. On February 26, 1992, the wiretap concluded. The wiretap authorization was issued in connection with an ongoing investigation of a purported conspiracy to manufacture and sell methamphetamine.

Westbrook and 10 codefendants were charged with having conspired to manufacture and market in excess of 100 pounds of methamphetamine. Additionally, Westbrook was charged with 23 counts of having transported, possessed, manufactured or sold a controlled substance.

Weestbrook filed eight motions regarding the electronic

surveillance including a section 1538.5 motion to suppress evidence for violation of section 629.14. Westbrook relied upon section 629.14's provisions that: 1) immediately upon the expiration of the authorization order or any extensions, the recordings are to be made available to the issuing judge and sealed under his or her directions; and 2) the presence of a seal provided for in the section or a satisfactory explanation for its absence is a prerequisite for the use or disclosure of the contents of any wire communication. Westbrook contended the tapes were never delivered to the judge, a judicial seal was never applied, no timely order regarding sealing was obtained and there was no satisfactory explanation for a six-month delay in obtaining an order regarding sealing.

In opposition the prosecution argued, inter alia, timely oral sealing orders were in effect and followed. In support of its opposition the prosecution submitted declarations by Evan Miller (Miller), the Deputy District Attorney asigned to work

with the narcotics investigation involving Westbrook, and Michael Hook (Hook), an El Cajon Police Department detective assigned to the investigation.

Hook in pertinent part made the following statements in his declaration. He was the case agent for the investigation in question. During the court-authorized wiretap he was in charge of handling and impounding all tape recordings. Each telephone line was equipped with two tape machines that simultaneously made four tape recordings. The first tape machine recorded a "District Attorney" and a "Court" copy while the second tape machine recorded a "Defense" and a "Working" copy. At the end of each shift the agents working that shift removed the tapes from the machines and placed them into individual evidence bags. The evidence bag containing the court copy was sealed and placed into a file cabinet in the wire room. Each day Hook removed the sealed evidence bag containing the court copy from the wire room. He maintained custody of the sealed bag until he transferred

it to the Drug Enforcement Agency (DEA) non-drug evidence custodian (evidence custodian) who placed the sealed bag in the non-drug evidence vault.

Miller in pertinent part made the following statements in his declaration. He had been assigned to work with Hook in the investigation involving Westbrook. In November 1991 Hook and Miller concluded conventional investigative techniques had failed and decided to seek authorization for a court-ordered wiretap. In December 1991 and January 1992, before the authorization of any wiretap, Miller met several times with Judge Edwards, the designated "wiretap" judge for the superior court. During one of those meetings, Miller discussed with Judge Edwards the requirement the recordings be "made available to the judge" and be kept "where the judge orders." Miller discussed with Judge Edwards a proposed procedure for sealing and maintaining the tapes, the procedure described in Hook's declaration. Miller "indicated" to the judge that the tapes could be sealed

and stored in that manner or "sealed and maintained in any other place" the judge "deemed appropriate." Miller advised Judge Edwards he thought it would be "more secure and less complicated" to keep the sealed tapes in the custody of Hook and the DEA evidence custodian. The judge agreed. Miller informed Hook of the judge's decision and reviewed the agreed to procedure to ensure Hook knew the court copies "had to be sealed and maintained for the court and could not be used for any other purpose."

Miller additionally declared that at the conclusion of the wiretap operation he again discussed the "made available" and "custody" requirements of section 629.14 with Judge Edwards. Because the tapes were already sealed and in the custody of the evidence custodian, Miller suggested to Judge Edwards that he designate the custodian as the person who should keep the recordings for 10 years as required by section 629.14. Judge Edwards agreed. Miller was to prepare a written order for the judge's signature. He failed to

do so until August 25, 1992, at which time Judge Edwards signed an order that pursuant to section 629.14 the tape recordings were "ordered sealed until further written order" and that the recordings were to be kept in the custody of the DEA evidence custodian for 10 years.

The court granted the section 1538.5 motion stating "[t]he wiretap recordings, and all evidence derived therefrom, must be suppressed pursuant to Penal Code Section 629.14." The court's basis for granting the motion was its belief Judge Edwards had delegated his non-delegable sealing function.

Before the petition for writ of mandate was filed in this court, the parties stipulated to augment the record for purposes of appellate review. The augmentation included a declaration by Judge Edwards.

Judge Edwards in pertinent part made the following statements in hid declaration. Before authorizing the wiretap, he met with Miller several times in December 1991 and January 1992 regarding the wiretap affidavit. During at least

one of those meetings, he discussed with Miller the procedure to be used to record, seal, and safely store the court's copy of the wiretap tape recordings. Miller and the judge discussed whether the DEA or the clerk of the court would maintain possession and custody of the sealed tape recordings. the judge was of the review, and Miller agreed, it would be more secure and less complicated to keep the court's copy of the sealed tape recordings in the custody of Hook and the DEA evidence custodian. The court's copy of the tape recording was to be immediately sealed and maintained for the court and could not be used for any other purpose. To thwart any claim the tape recordings had been compromised, Miller agreed to the court's tape recording being "removed from the tape machine, tab removed, sealed and put into evidence." On at least one occasion during the interception of wire communications, Miller and Hook assured the judge "that as the tape recordings were being made, they were removed from the machine, tabs removed, sealed and stored as [they]

had earlier discussed."

Judge Edwards additionally declared that on February 27, 1992, the day after the wiretap terminated, he discussed with Miller the "made available" and "custody" requirement of section 629.14 with respect to the court's copy of the tape recordings. Miller reassured him the recordings had remained sealed and in the custody of the DEA evidence custodian. The judge did not want the tape recordings delivered to him because he did not want either himself or court personnel to be responsible for their storage. To avoid any need for the judge or court personnel to be witnesses in the matter, the judge also did not want either himself or court personnel to be part of the chain of custody. For those reasons, and because the tapes had been sealed from the outset, he ordered that the DEA evidence custodian be designated the person responsible for the storage of the sealed tape recordings in accordance with section 629.14. Miller indicated he would prepare an order for Judge Edwards's signature. On August

25, 1992, Miller presented the order which was signed that day.

These proceedings ensued. We issued an order to show cause and held oral argument.

DISCUSSION

I.

Section 629.14 in pertinent part provides:

> "Immediately upon the expiration of the period of the order, or extensions thereof, the recordings shall be made available to the judge issuing the order and sealed under his or her directions....The presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire communication or evidence derived therefrom under Section 629.28."

The prosecution argues, inter alia, that the court erred in granting the motion to suppress because a timely oral sealing was in effect and followed in this case. The prosecution further argues there is no requirement for a sealing order under section 629.14 to be in writing or for the tapes to actually be delivered or presented to the court for

sealing. Westbrook on the other hand argues the court correctly suppressed the tapes for violation of the sealing requirements. According to Westbrook the tapes were never "made available" to the judge within the meaning of the statute, no judicial seal was ever applied, a judicial order was never sought until six months after the termination of the wiretap and the order that was eventually obtained was insufficient.

Three questions are presented for our consideration:

(1) Can a sealing order be oral rather than written?

(2) Must the tapes be presented to the judge for sealing in his or her presence?

(3) Assuming an oral order may be sufficient and presentation is not required, were the oral "orders" in this case sufficient to meet the purpose and requirements of section 629.14?

As discussed below, we conclude a sealing order may be oral, the tapes need not be presented to the judge for

sealing in his or her presence and the procedure used here met the requirements and purposes of the section. Any delay in seeking a written order or deficiency in that order is therefore irrelevant.

II

Section 629.14 does not contain a specific requirement for a written sealing order. It simply requires that the recordings be "made available" to the judge "issuing the order and sealed under his or her direction." The parties have cited no California cases addressing this issue. Nor have we located any such cases. The pertinent language of section 629.14 is however virtually identical to that contained in 18 U.S.C. section 2518 (8) (a), the federal law governing the court sealing requirement. We therefore turn to federal law for guidance.

In United States v. Gigante (2nd Cir. 1976) 538 F.2d 502 the government obtained a series of orders authorizing electronic surveillance. The trial judge suppressed certain of

the tapes because, inter alia, there had been no formal sealing order or record of the judicial sealing proceedings with respect to those tapes. (Id. at p. 505.) The Second Circuit disagreed.

> "While we agree that it might be better practice for the issuing judge to sign a formal order directing the sealing and custody of the tapes, and to maintain a record of that proceeding, such procedures are not required by § 2518 (8) (a). Rather the subsection states merely that the judge shall provide directions as to sealing and custody. Because Judge Gurfein apparently gave such instructions as to the products of the first wiretap, we cannot conclude that their suppression was mandated." (Id. at pg. 507. See also United States v. Diana (4th Cir. 1979) 605 F.2d 1307, 1311 fn. 2, 1315.)

The reasoning of the federal cases apply equally to the California statute. A written order is not required by section 629.14. Nor does the absence of such order compromise the purpose of the sealing requirement "to ensure the reliability and integrity of evidence obtained by means of electronic surveillance." (United States v. Ojeda Rios (1990) 495 U.S. 257, 263.) (Ojeda Rios) If an oral order is challenged it

simply requires the use of declarations by the issuing judge as was done in this case. The cumbersome nature of the procedure, however, makes it clear the better practice is for the trial court to issue a formal written order. Nevertheless, such order is not statutorily mandated.

III

We turn next to whether or not the statute requires the tapes actually be delivered to the court for sealing in the judge's presence. Once again the parties have not cited nor have we located any California cases on point. Relying on United States v. Abraham (6th Cir. 1976) 541 F.2d 624 (Abraham) the prosecution argues there is no requirement the tapes actually be delivered to the judge for sealing in his or her presence. Rather, it contends the "made available" requirement of the statute is met by the tapes being available to the judge should he or she want them produced. Westbrook on the other hand contends the statute requires the tapes be "made available" in the sense of being brought

into the presence of the judge so as to permit him or her to order the seal applied and verify the presence of the judicial seal required by statute.

In Abraham an attorney for the Department of Justice filed motions to seal tapes immediately upon termination of the authorization orders. The district judge who had authorized the wiretaps ordered the tapes sealed and placed in the custody of the local Federal Bureau of Investigation (FBI) office. The judge entered the order without requiring the tapes to be brought to him or viewing them in the FBI office where they were then in custody. (Abraham, supra, 541 F.2d at pp. 626-627) Upon a government motion for a ruling on the adequacy of the sealing procedure, the trial judge ordered suppression because it concluded Congress intended the tapes to be presented to the judge personally and the seal applied in the presence and under the direction of the judge. (Id. at p. 627.) The Sixth Circuit disagreed.

> "We find nothing in the language of § 2518 (8) (a) which requires the presence of the judge as

> the sealing of the recordings takes place. The evidence disclosed that the government attorney advised the District Judge that the original tapes of interception were available for inspection at the time he presented the motions for orders sealing them. This was a literal compliance with the statutory requirement that the recordings be made available to the judge who had issued the intercept order. Here the Judge declined to inspect the tapes, and we find no statutory command that he do so...The statute directs that the recordings be sealed under the judge's direction, not in his presence." (Ibid.)

The court further stated that the sealing requirement appeared to be related to maintaining confidentiality of the records and discussed that the judge's presence at the actual sealing would not further that purpose. (Abraham, supra, 541 F.2d at p. 628.

Westbrook contends that federal law is in overwhelming agreement that the words "made available" are synonymous with presenting or delivering the tapes to the judge. The dissent agrees that multiple cases reflect an understanding that tapes must be physically presented to the authorizing judge for sealing. Although the cases cited by the dissent

and Westbrook discuss delivery or presentation of the tapes, not one of them involved facts in which the judge issuing a sealing order directed how the tapes were to be sealed but elected not to have the tapes delivered into his or her presence for the actual sealing. Rather the cases generally involved situations in which the tapes had been presented or delivered to the judge and the reviewing court discussed the procedure followed. (See United States v. Pedroni (9th Cir. 1992) 958 F.2d 262, 264-266 [tapes delivered to judge for sealing 14 days after surveillance termination with issue being whether there was a satisfactory explanation for delay]; United States v. Rodriguez (2d Cir. 1986) 786 F.2d 472, 476-478 [tapes presented to the judge after 14-day delay with issue being the adequacy of the government's explanation for delay]; United States v. Cohen (5th Cir. 1976) 530 F.2d 43, disapproved on another point in Ojeda Rios, supra, 495 U.S. at p. 265, fn. 5 [five-week delay in delivering tapes]; State v. Chiarizio (1986) 201 Conn. App. 673, 691-693 [614 A. 2d 370,

381-382] [tapes delivered to secretary of judicial wiretap panel who adopted seal earlier applied by police agent with issue being whether procedures followed complied with sealing requirements of statute]; United States v. Vastola (3d Cir. 1990) 915 F.2d 865, 866-867 [45-day delay in delivering tapes].)

The only case cited by Westbrook that addresses whether presentation to the judge for sealing is required is People v. Nicoletti (1974) 34 N.Y.2d 249 [356 N.Y.S.2d 855, 313 N.E.2d 336]. In Nicoletti the tapes of the intercepted conversations were kept in the footlocker in the home of a detective involved in the investigation who later delivered the locked footlocker to the district attorney. Two police officers and the district attorney had the combination to the footlocker. The district attorney and police officers reviewed the tapes at the detective's home, transcriptions were made and tapes were re-recorded. None of the tapes were ever sealed. The judge who issued the eavesdropping warrant was advised of

the storage arrangements. New York's electronic surveillance statutes then in effect had provisions essentially identical to those in issue here. (N.Y. Crim. Proc. Law,[2] § 822, subd. (2) (Consol. 1993).) The Court of Appeals found the tapes inadmissable because of violation of the sealing requirement and reversed the defendants' convictions.

Nicoletti is readily distinguished. Here, the court from the very onset directed how the tapes were to be sealed. The tapes were sealed in accordance with the court's discretion. A separate court copy was maintained in a sealed evidence bag and used for no other purposes. The only similarity between Nicoletti and the facts presented here is that the tapes were not presented to the judge for sealing in his presence. A subsequent New York case has ruled that sealing in the judge's presence is not required by the statute. (See People v. Portanova (1977) 56 A.D.2d 265, 268-269 [392

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[2] Current version codified at New York Criminal Procedure Law section 700.50, subdivision (2) (Consolidated Laws Service 1993).

N.Y.S.2d 123, 127].) Abraham is the only case with facts similar to those in issue here.

Westbrook incorrectly contends Abraham has been overruled by Ojeda Rios. Ojeda Rios held that the "satisfactory explanation" requirement of 18 U.S.C. § 2518(8)(a) applied to a delay in sealing as well as a complete failure to seal tapes and that the "satisfactory explanation" language required the government to not only explain why a delay occurred but also why it was excusable. (Ojeda Rios, supra, 495 U.S. 257 at p. 262). Ojeda Rios did not address the questions at issue here of whether tapes must be physically presented to a judge and actually sealed in his or her presence.

The court in Ojeda Rios found the purpose of the sealing requirement to be to ensure the reliability and integrity of tapes and concluded Congress had viewed the sealing requirement as a limitation on the Government's opportunity to alter the tapes. (Ojeda Rios, supra, 495 U.S. 257 at p.

263). Here, the dissent attacks the continued viability of Abraham based on the Abraham court's reasoning the purpose of the statute was to maintain confidentiality. Ojeda Rios has not vitiated Abraham's reasoning that the statutory language does not require sealing to be done in the judge's presence.

Section 629.14 does not require tapes to be presented to the issuing judge and sealed in his or her presence. Rather, it requires the tapes be "made available" to the judge and "sealed under his or her direction." By making the tapes available to the judge and sealing them pursuant to his or her direction the literal requirements of the stature are met. The statute does not require the judge to actually observe the tapes and participate in their sealing. As long as the procedures followed comply with the literal requirements of the statute and serve the statutory purpose as set forth in Ojeda Rios, we will require no more.

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IV

We next examine whether the procedures followed here complied with the literal requirements of the statute and whether they additionally served the purpose of the statute.

Judge Edwards was involved in establishing a secure method for sealing and storing the court's copy of the tapes even before the order authorizing the wiretap was issued. Pursuant to Judge Edwards's direction the court's copies of the tapes were to be immediately sealed and maintained for the court's exclusive use. At the end of each shift the agents working the shift were to remove the tapes from the machines, seal them in individual evidence bags and place them in a file cabinet in the wire room. Hook was to daily remove the sealed bags and maintain exclusive custody until he transferred them to the DEA evidence custodian who was to store the sealed bags in the DEA non-drug evidence vault. During the course of the investigation, the judge obtained assurances from Hook and Miller that sealing and storage

were being conducted as he had directed.

The day after the surveillance terminated, Judge Edwards elected not to have the tapes delivered to the court for sealing in his presence. Rather, in light of the tapes having already been sealed and stored in accordance with his earlier direction, he orally ordered the DEA custodian be designated the person responsible for storage for the 10 years required under § 629.14.

We conclude the procedure followed complied with the minimum requirements of the statute. The tapes were sealed by the agents pursuant to the court's direction. The day after surveillance concluded, the court ordered the long-term custody arrangements. In some respects the procedure followed exceeded the statutory requirements. Rather, than waiting until the conclusion of the surveillance the court directed sealing as the tapes were made. The immediacy requirement was clearly exceeded.

The real essence of Westbrook's challenge is to Judge

Edwards not having the tapes brought to court for resealing in his presence but rather relying on the sealing by a government agent. As we have previously discussed, the statute does not require sealing in the judge's presence. Nor does it prohibit sealing by a government agent. Case law supports the court's actions in both those respects. (Abraham, supra, 541 F.2d 624; People v. Portanova, supra, 56 A.D.2d 265 [392 N.Y.S.2d 123].)

Does such a procedure however violate the purposes of the sealing requirement to ensure the reliability and integrity of the tapes? A separate tape was made for the court and immediately sealed. When the tape left the wire room, custody rested with Hook and the evidence custodian exclusively. The custodians of the sealed tapes were aware they were under court order to maintain the tapes inviolate for the court and that they were subject to court review. The court in fact assured through Miller that the tapes were being sealed and secured as ordered. The court tapes were never

used for copying or review.

It is impossible to eradicate all possibility of tampering by a government agency responsible for the surveillance operation. Where sealing is done in the court's presence at the expiration of the wiretap authorization or extensions, the tapes may be available for government "tampering" for extended periods of time before the sealing takes place. In this case the wiretap authorization was issued on January 15, 1992, and the wiretap concluded on February 26, 1992. Had the court had the tapes presented for sealing in its presence rather than having the tapes sealed at the end of each shift was done here, some unsealed tapes would have been vulnerable to "tampering" for well over a month. Under the procedure followed here the opportunity for tampering was kept at a minimum. There is no contention the tapes have been compromised in any respect. Under these circumstances, we conclude the statutory purpose of ensuring the reliability and integrity of the tapes has been served by the

procedure followed.

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its order granting Westbrook's motion to suppress evidence for violation of § 629.14 and to issue a new order denying the motion.

_____/s/_____
TODD, J.

I CONCUR:

_____/s/_____
BENKE, J.

Wiener, J., dissenting:

In granting Westbrook's § 1538.5 motion to suppress the wiretaps, the court explained:

> "The wiretap recordings, and all evidence derived therefrom, must be suppressed pursuant to Penal Code section 629.14. Whatever other safeguards the Legislature may have included in the statute, it adopted the federal sealing provisions. The gist of those procedures is, that once the wiretaps are completed, the tape shall come under court control and be placed under seal under the direction of the judge. The statute permits storage by others, but not the sealing function. The point of the exercise is to deny the agency access to the tapes by a sealing operation conducted under the supervision of the judge...The court is bound to apply the law in accordance with its terms and suppress the evidence."

I agree with the trial court. The statutory requirement for court sealing is meaningless if the judge can merely delegate to law enforcement the job of sealing the tapes at a later time.

To a great extent the majority rests its conclusion on United States v. Abraham (6th Cir. 1976) 541 F.2d 624, which it describes as "the only case with facets similar to those in

issue here." (Maj. opn. p.14.) Although this may be literally correct, there are a number of cases from both federal and state court which fairly reflect the appellate court's understanding that the tapes must be physically presented to the authorizing judge (or at least a judicial employee) for sealing. (See, e.g., United States v. Vastola (3d Cir. 1990) 915 F.2d 865, 866 ["[T]he government did not immediately present them for judicial sealing, as required by section 2518..."]; United States v. Rodriguez (2d Cir. 1986) 786 F.2d 472, 476 ["[W]e suggested that any presentation made more than two days after the end of the wiretap could not be considered immediate"]; United States v. Cohen (5th Cir. 1976) 530 F.2d 43, 46 [approving a delay in sealing tapes "although the better procedure would have been to deliver the tapes immediately to the judge...."[1]]; State v. Chiarizio (Conn. App. 1986) 514 A.2d 370, 382 ["We agree with the defendant

1 Cohen was disapproved on other grounds in United States v. Ojeda Rios (1990) 495 U.S. 257, 265, fn. 5.

petition.

BACKGROUND

On January 15, 1992, the Honorable Raymond Edwards, Jr., on application of the San Diego District Attorney's Office issued an order authorizing the interception of wire communications of telephone numbers belonging to Westbrook and another defendant. On February 13, 1992, Judge Edwards signed an extension of the authorization. On February 26, 1992, the wiretap concluded. The wiretap authorization was issued in connection with an ongoing investigation of a purported conspiracy to manufacture and sell methamphetamine.

Westbrook and 10 codefendants were charged with having conspired to manufacture and market in excess of 100 pounds of methamphetamine. Additionally, Westbrook was charged with 23 counts of having transported, possessed, manufactured or sold a controlled substance.

Weestbrook filed eight motions regarding the electronic

surveillance including a section 1538.5 motion to suppress evidence for violation of section 629.14. Westbrook relied upon section 629.14's provisions that: 1) immediately upon the expiration of the authorization order or any extensions, the recordings are to be made available to the issuing judge and sealed under his or her directions; and 2) the presence of a seal provided for in the section or a satisfactory explanation for its absence is a prerequisite for the use or disclosure of the contents of any wire communication. Westbrook contended the tapes were never delivered to the judge, a judicial seal was never applied, no timely order regarding sealing was obtained and there was no satisfactory explanation for a six-month delay in obtaining an order regarding sealing.

In opposition the prosecution argued, inter alia, timely oral sealing orders were in effect and followed. In support of its opposition the prosecution submitted declarations by Evan Miller (Miller), the Deputy District Attorney asigned to work

viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings." (Id. at p. 263.)

Where the purpose of the statute is to prevent alteration of the tapes by the government, that purpose is served only where the tapes are removed from prosecution custody for sealing. It is true that pre-sealing alteration is still a possibility, but the statute also addresses that issue by requiring that the tapes be presented to the judge "immediately" following the completion of the wiretap, and the burden is on the prosecution to offer a reasonable explanation for any delay. Moreover, it may be that Congress (and inferentially the California Legislature) was more concerned with the possibility of alteration after the nature of the defense became clear. Under the procedure followed in this case, no neutral third party was aware of when the tapes were actually

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sealed. This seems to me clearly contrary to the legislative intent underlying the statute.

I would therefore deny the petition.

CERTIFIED FOR PUBLICATION

_____/s/_____
Weiner, Acting P.J.

Fourth Appellate District, Division One,
No. D017961
S033061

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

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